MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 425C (GOV)** **Government Response** To Mr. Mohammad's Motion To Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief 24 May 2016

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

2. Relief Sought

The Prosecution respectfully requests the Commission deny the Defense motion.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

4. Facts

On 10 August 2012, the Prosecution filed AE 052 and four days later provided a consolidated notice to the Defense that the Prosecution had filed an *ex parte, in camera* notice to the Commission that the Government intended to preserve and/or substitute certain information pursuant to 10 U.S.C. § 949p-4(b); M.C.R.E. 505 (f)(2)(A). *See* AE 052; AE 092, Consolidated

Notice. The Defense was also notified of the type of information the Prosecution sought to have preserved and/or substituted.

On 4 June 2014, the Military Judge, in an *Ex Parte, Under Seal* Order, granted the Prosecution's request to preserve and/or substitute the information. Within the Order, the Military Judge also denied other Defense motions for relief relating to the issue. In accepting the Prosecution's adequate substitute, the Military Judge indicated that a redacted version of his order shall be provided to all parties, and the Order was to be sealed until further order of the Commission or the order of another court of competent jurisdiction. *Id.* at 7.

On 6 June 2014, the Trial Judiciary sent all parties an unclassified placeholder for an *Ex Parte, In Camera* Classified Order in AE 051B and AE 052EE. AE 051 and AE 052 were the Prosecution filings in which the Prosecution requested an order allowing for the preservation and/or substitution of the information at issue.

Between April 2014 and October 2015, this Military Commission held sessions focused almost exclusively on issues related to the AE 292 motion series, which pertained to a potential conflict of interest stemming from an FBI investigation of one of the Defense teams.

While the Prosecution's filing in AE 052 did not concede that the information it sought to preserve and/or substitute was discoverable to the Defense, and while the Military Judge's ruling that the substitute was adequate included no order to produce the information at issue, the Prosecution, in order to expedite litigation in this case, nonetheless provided the information to Defense counsel for Mr. Ali. The Prosecution delivered the adequate substitute of the information at issue on or about 29 July 2015.

On or about 5 November 2015, Defense counsel for Messrs. Mohammad, Bin 'Attash, Binalshibh and Hawsawi received the adequate substitute of the information at issue, after they

had finally signed the Memorandum of Understanding associated with *Third Amended* Protective Order #1, which allowed them to receive classified information.

In one of his rulings on the issue, the Military Judge found that by producing the summary of this information, the Government is considered to have met its discovery obligations regarding the information that was preserved and/or substituted.

5. Discussion

Continuing their scorched-earth litigation strategy Defense counsel for Mr. Mohammad[1] maligns the reputation of the Military Judge and the entire Prosecution team, accusing them of various misdeeds that, if true, would constitute breaches of judicial and prosecutorial ethics. Of course, much of it is defense-manufactured nonsense, but that does not stop Defense counsel for Mr. Mohammad from spewing on about prosecutor-judge "collusion."[2]

Despite the fact that the issue in question deals with classified information, with specific facts being germane to the allegations it raised, Defense counsel drafted an intentionally vague and unclassified motion, alleging: "secret communications[3];" "bad faith destruction of exculpatory evidence;[4]" "surreptitious authorization of destruction[5]"; "participation [by Judge Pohl] in the Prosecution's orchestration of events[6];" "lack of detached and impartial[ ] and

[1] The Prosecution's response to the wording in the motion is directed only at Counsel for Mr. Mohammad, who drafted this motion and signed it. The motion has a (Mohammad) designation, Counsel for Mr. Hawsawi declined joinder of the motion, and Counsel for Mr. Ali have indicated that they may decline joinder following a meeting with their client. Although Counsel for Mr. Bin 'Attash and Mr. Binalshibh are presumed to join motions that they do not decline to join, we refrain from imputing to them the wild and reckless language and reasoning set forth in this defense motion.

[2] AE 425 (Mohammad) at 10 ("Here, the Military Judge, in concert with the prosecution, manipulated secret proceedings and the use of secret orders to mislead the defense and unfairly deprive Mr. Mohammad of his otherwise available remedies to prevent the destruction of material, helpful evidence.").

[3] *Id*. at 6.

[4] *Id*. at 22.

[5] *Id*. at 3.

[6] *Id*. at 3.

neutral, even-handed administration of the laws governing this case[7];" "acting in tandem with the prosecution [to] mislead[] the Defense;"[8] engaging in "grossly improper" judicial conduct";[9] "reassur[ing] Mr. Mohammad's counsel that critical evidence would not be destroyed [while] issu[ing] a secret order at the clandestine behest of the government . . . ";[10] "permitting the prosecution to destroy . . . evidence without informing Mr. Mohammad's counsel…."; giving the Defense a "judicial head-fake";[11] creating the "specter of collusion and fraud on the defense;"[12] and conducting "near-Star Chamber proceedings."[13] The Defense then immediately called a press conference to trumpet how Mr. Mohammad, the self-professed mastermind of the mass-murder of 2,976 people on September 11, 2001, just simply could not receive a fair trial without this "evidence."

As such, and in order to meaningfully defend the actions of the Military Judge, the Prosecution, and the integrity of the Military Commissions system of justice, the Prosecution hereby responds, in turn, in an unclassified pleading that also does not detail the specific information at issue, but incorporates, by reference, its response to AE 051F and AE 052KK. Those filings provide the Military Judge more detailed facts to rebut the Defense's baseless allegations.

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[7] *Id.* at 4.

[8] *Id.* at 8.

[9] *Id.* at 10.

[10] *Id.* at 12.

[11] *Id.* at 12.

[12] *Id.* at 22.

[13] *Id.* at 12.

I. The Defense Filing Fails to Cite to Relevant and Material Facts In an Effort to Shape a More Compelling Defense Narrative

In moving for recusal, and in seeking to batter the reputation of the Military Judge who has served his country honorably[14] for more than 35 years, the Defense conveniently leaves out facts that do not comport with its willfully blind narrative. For example, the Defense filing fails to mention that the information at issue was both preserved and/or adequately substituted, and was consistent with how the federal courts handles similar issues. Defense Counsel for Mr. Mohammad also do not mention, in their unclassified hatchet-job of a motion, that notice of an *ex parte* order regarding the very motions in which the Prosecution sought preservation/substitution of the information was issued by the Military Judge and distributed by the Trial Judiciary to all parties on 6 June 2014. Further, the Defense fails to detail that they had received an adequate substitute of the "evidence" pursuant to M.C.R.E. 505, created at great cost to the Government, which the Military Judge found gives the Defense substantially the same ability to make a defense as would discovery of or access to the specific classified information. Still further, the Defense omits from its rash account that the Government has agreed to also produce hard copy photographs of the information to the Defense that can be used at trial, and that alternate means of preservation, such as hard copy photographs are consistent with general standards of evidence preservation. *See generally* Federal Evidence Practice Guide § 2.10 [3] (a) (b) (Bender 2006).

Moreover, the Defense counsel also conveniently gloss over that these so-called "secret communications" between the Military Judge and the Prosecution were authorized *ex parte* communications pursuant to the Military Commissions Act, *see* 10 U.S.C § 949p-4(b)(2); that

[14] In what appears to be the sort of head-faking they have no hesitation ascribing to others, the Defense refers to the Military Judge as "The Honorable Judge Pohl" both before and after attempting to eviscerate his professional reputation and calling for his recusal. AE 425 (Mohammad) at 4.

the Prosecution is required to, and indeed had given, Defense notice of the *ex parte* filings on the issue; that the Defense enjoys its own "secret" *ex parte* communications with the Military Judge in asking for expert consultants, and, that while explicitly required neither by the Military Commissions Act nor the Manual for Military Commissions, the Prosecution has declined to oppose such *ex parte* communications between Defense and Military Judge by consciously taking an interpretation of R.M.C. 703 that would permit them.

However, none of these things seem to matter to the Defense. For the Defense counsel seek to undermine the Military Commission system – a system codified by two act of Congress, signed into law by two different Presidents, and implemented by military and legal professionals who daily seek to honor their oaths. Defense counsel will apparently stop at nothing in their attempts to convince whoever may still be following their shrill antics that justice is simply not attainable at Guantanamo Bay before a military commission. Their goal is not acquittal in this case; their goal, and their entire defense strategy, is that the case never, ever be tried. They seek to advance this goal by attacking and litigating every possible thing imaginable, from the habitability of their living quarters, to the cleanliness of their work spaces, to not signing a commonly-required MOU that would allow for them to receive classified information (for over two years). If the reputation of a Colonel in the U.S. Army who has served his country honorably for over 35 years have to get in the way of that, so be it. The Prosecution has no intention of letting such a cynical strategy succeed.

II. The Defense Purported Understanding of the "Letter and Sprit" of the Commission's Order Was Unreasonable Under the Circumstances

To the extent the Defense counsel claims they "reasonably understood the letter and spirit of the Military Judge's order to require the Government to maintain the status quo and not destroy the evidence until such time as the Commission issued a new and different order,"

AE 425 (Mohammad) at 5-6, they were correct. But in doing so, they fail to acknowledge the significance of the Order that occurred, and that notice of said Order was sent on 6 June 2014 to all the parties regarding the Prosecution motions that sought the preservation and/or substitution of the classified information at issue. The Defense should have understood full well that if the Prosecution's motion in AE 052 was granted, the information at issue was going to be preserved and/or substituted, and that such order would overcome any previous promise by the Prosecution to preserve the *status quo* pending an order from the court, or any order of the Military Judge to preserve the *status quo*. Any other understanding of the "letter and spirit" of the Military Judge's Order was not "reasonable" in light of the filings or the rulings. In the Defense filing, there is little Defense acknowledgment that the "new and different order" was, in fact, issued by the Military Judge, consistent with the Prosecution's requested relief, which was not decided until extensive classified litigation occurred in which the Defense participated, and lost, and which was not finally decided until almost two years of litigation that occurred after the Prosecution first filed its motion.

While the Defense may have understood the spirit of the Order in a way that comported with their own litigation wishes, that clearly was neither the Military Judge nor Prosecution's understanding of the litigation, as the Military Judge's Order authorizing the preservation and/or substitution of the information makes crystal clear. The fact that the Defense misunderstood the significance of the Prosecution's filing, and the Military Judge's order to preserve the status quo, does not a conspiracy make.

The Defense cannot now with a straight-face claim that the Prosecution's agreement to maintain the *status quo* pending the outcome of its own motion was anything other than an agreement that the Prosecution would not move on its request to preserve and/or substitute the

information until the Military Judge determined that that the Prosecution's proposed substitute was a reasonable substitute for Defense access to the actual classified information at issue. For any other reading of the Prosecution's motion, and the Military Judge's rulings on the related issues, strains credulity. Preservation orders, and relief from preservation orders, such as happened in the instant case, are not uncommon in litigation. Preservation orders can "best preserve relevant matter without imposing undue burdens" on the party preserving the evidence. Manual for Complex Litigation (Fourth) § 11.442. Even if an opposing counsel objects, a court may modify the party's preservation obligations or permit "the alteration or destruction of physical evidence" once the preserving party "show[s] good cause." *Id.*

III. No Secret Destruction of Evidence Occurred, and There Is No Evidence of Bad Faith

In regimes where secret destruction of evidence actually does take place, prosecutors do not file motions giving defense counsel notice that they intend to request approval of ways to adequately preserve the evidence; nor do they even seek judicial approval; nor do they rigorously attend to the parameters of other existing judicial orders. In its filings, the Prosecution simply agreed, consistent with its perceived need to file the motion in the first place, that it would not take the final steps it outlined following its request to preserve and/or substitute the information pending the outcome of its own motion filed in June 2012, on which the Military Judge ruled 4 June 2014. In regimes lacking the demonstrable judicial independence of this Military Commission, judges who want to issue orders in secret do not send notice of the fact that an order was issued—something that happened here on 6 June 2014, in response to the Prosecution's requested relief. The fact that the Prosecution proposed, and the Military Judge ordered, a redacted version of his order be provided to the Defense counsel also renders meritless

the Defense theory that the order was "done in secret" and resulted from collusion among the Prosecution and the Military Judge.

While it is undoubtedly true that the redacted Order was delayed before being provided to the Defense, the Commission's intent was clear that it be provided to the Defense. There is no evidence which could establish that the Military Judge and the Prosecution team "colluded" to delay the provision of the Order to the Defense, because such a reckless allegation is simply untrue. If anything, the Prosecution and the Judiciary did anything but collude, as miscommunication and/or lack of communication between the Prosecution and the Military Judge caused the delay of the redacted order being provided to the Defense. The Order, which was initially drafted and proposed by the Prosecution, was drafted in such a way that both the Trial Judiciary and Prosecution could reasonably believe that the other was to provide the redacted order to the Defense, which is what happened in this case.

While regrettable that the Defense was not notified by redacted order sooner than January 2016, such a delay was not attributable to any bad faith, and the Defense has offered no evidence to the contrary—just rank speculation and conjecture. "Unless a defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *United States v. Youngblood*, 488 U.S. 51, 58 (1988). The Prosecution would not have opposed the Defense receiving the redacted order on the very day the Order was issued, and nothing in the Prosecution's *ex parte, in camera* filing asked the Military Judge for a delay in informing the Defense of the Order. Simple miscommunication, resulting in inaction, is what caused a delay of provision of the redacted order to the Defense, nothing else. That the Defense now irresponsibly paints this as unethical, nefarious double-

dealing between fellow officers of the court and the Military Judge is wrong, and completely unsupported by any evidence.

The Military Judge's Order, a draft of which was proposed by the Prosecution (which included the language directing that a redacted order be provided) did not direct the Prosecution to provide a redacted order, and the Prosecution had anticipated that the redacted Order would come from the Trial Judiciary, like other orders, following a classification review. The Prosecution has never provided an order from the Trial Judiciary to the Defense counsel during these proceedings. In the Summer of 2015, as filings were remaining on the docket that appeared to be overcome by the Order, the Prosecution (not unlike Mr. Connell) reached out to the clerks in the Trial Judiciary for guidance. It is important to note, however, that from April 2014 to October 2015, there were no sessions of the military commission other than those few dealing with AE 292, wherein the United States was represented by the Special Review Team (SRT) and four of the five defense teams were claiming they labored under a conflict of interest that prohibited them from moving forward in the case. Once the normal criminal litigation in this case began again, in earnest, in October 2015, the Prosecution sought to clarify the status of the redacted order. The Prosecution approached Trial Judiciary staff in October 2015, and again in December 2015, to get clarity on providing the Order. It was during the December 2015 session of the Military Commission that the Prosecution was informed it was to propose a redacted version of the Order, which it did, in turn.

IV. The Defense Suffered No Actual Prejudice From the Delay of Provision of the Order

Despite the fact that the Defense was not given a copy of the Order until January 2016, and contrary to their claims, the Defense has suffered zero prejudice from the delay in receiving the Military Judge's order. The Military Judge determined that the Prosecution had "adequately

substituted" the information under R.M.C. 505(f)(2)(A). Such orders are not subject to a motion for reconsideration if such order was entered pursuant to an *ex parte* showing, as was the case here. *See* M.C.R.E. 505(f)(3). Contrary to Defense averments as to what it would have done if notified of the Order earlier, it would have defeated the entire purpose behind the protections set forth in M.C.R.E. 505 and the classified information privilege were the Defense to be permitted to see the actual original classified information. Nor could the Defense take an interlocutory appeal to the United States Court of Military Commission Review (U.S.C.M.C.R.) seeking reversal of the Military Judge's finding that the substitute was adequate; as the Defense has no such right of interlocutory appeal. *See* 10 U.S.C §950d. If the Defense had sought a different ruling in a habeas context, or had petitioned a federal court for a writ of prohibition, it would have run head-first into the fact that federal courts have treated this issue in a similar fashion. The adequate substitute is all the Defense would have ever been entitled to under the law; so the fact that they were not notified of the specifics of the order until 18 months later, while regrettable, and completely unintentional, caused no actual prejudice to the Accused.

The Prosecution is confident that the Order of the Military Commission on the issue is lawful, and will be upheld by any court on appeal. The Defense has made its objections and established its record in the previous litigation; so should the Accused be convicted, the issue of whether any of the Accused's rights had been violated by the preservation and/or substitution of the information at issue can then be appealed. But to suggest that Mr. Mohammad's case is somehow materially prejudiced by the adequate substitute of the information that has been provided is simply inaccurate.

Both the Prosecution (in asking) and the Military Judge (in ordering) the preservation and/or substitution of information acted lawfully, and consistently with like orders of federal

courts. The preservation and/or substitute of information grants the Defense "substantially the same ability to make a defense as would discovery of, or access to, the specific classified information." *See* M.C.R.E. 505 (f)(2)(C). As such, the Defense has suffered no prejudice.

If the Defense can claim one of the Accused's rights have been violated by the preservation and/or substitution order issued by the Military Judge, and that the adequate substitute does not cure that violation, they have everything they need right now to make whatever claim they want, in whatever court they choose, asking for whatever relief they want. If they are correct in that one of the Accused's rights was abrogated, they may be entitled to some relief. If they are incorrect, they would be entitled to no relief. But either way, the Defense simply has not been prejudiced by not having access to the information in its original form at this time, and there has been no harm to their case.

V. The Facts As They Actually Occurred and the Standard for Recusal.

The Defense cites to *Liteky v. United States*, 510 U.S. 540, 548 (1994) for the proposition that all factors for recusal must be evaluated on an objective basis. *See* AE 425 (Mohammad) at 11. While that may be true, interestingly, *Liteky,* also holds that judicial rulings alone almost never constitute a valid basis for a bias or impartiality motion to recuse a judge. *Id.* at 554 (citing *United States v. Grinnell Corp.*, 384 U.S. at 583). "In and of themselves…they cannot possibly show reliance upon an extrajudicial source [of bias]; and only in the rarest circumstance can they show the degree of favoritism or antagonism required… when no extra judicial source is involved." *Id.* at 554. The facts of the instant case all stem from various different judicial rulings, and are not "the rarest of circumstances" that would constitute a valid basis for recusal based on bias or impartiality. Even under the standards set forth by the Defense in *Parker v. Connors Steel Co*, 855 F.2d 1510, 1524 (11th Cir.1988), and *United States v. Berman*, 28 M.J.

615 at 617-18 (A.F.C.M.R. 1989), (*See* AE 425 (Mohammad) at 11), there are no grounds for recusal of the Military Judge.

In *Parker,* the test enunciated by the 11th Circuit is whether "an objective disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Id.* In *Berman*, the test enunciated by the Air Force Court of Criminal Appeals is "whether an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was done." *Id.*

A disinterested lay observer, knowing the facts as they actually happened, would not harbor a significant doubt as to the Military Judge's impartiality. The actual facts, as established by the filings, orders, and other attachments are these:

- On 10 August 2012, the Prosecution filed a classified, *ex parte*, *in camera* motion and four days later provided notice to the Defense that the Prosecution had filed the motion and that the government intended to preserve and/or substitute certain information pursuant to a rule modeled after the Classified Information Protection Act (CIPA) used in federal courts. The Defense was notified of the general type of information the Prosecution sought to have preserved and/or substituted. There are approximately 75 separate filings/orders/and rulings[15] from the various parties on the issue over the period of the last 3 ½ years.

- Following the Prosecution's filing, the Defense filed a motion opposing the Prosecution's plan to preserve and/or substitute the classified information at issue. The Prosecution, consistent with its filing in AE 052, agreed to not go forth with the plan until the issue in AE 052 was ruled on, and the Judge granted the Defense's motion, *pending further order of the court.*

- On 4 June 2014, after almost 2 years of litigation on the issue, the Military Judge, issued such an E*x Parte / Under Seal* Order, granting the Prosecution's request to preserve and/or substitute the information, and denying three Defense motions relating to relief they requested on the issue. In accepting the Prosecution's adequate substitute, the Military Judge indicated that a redacted version of his order shall be provided to all parties, and the Order

[15] As set forth in the most recent filings inventory.

was to be sealed until further order of the Commission or the order of another court of competent jurisdiction. *Id.* at 7.

- On 6 June 2014, the Judiciary sent to all parties an unclassified placeholder for an *Ex Parte, In Camera* Classified Order in AE 051B and AE 052EE, which indicated that the Prosecution's *ex parte, in camera* filing had been ruled on (but gave no details of the ruling). AE 051 and AE 052 were the Prosecution filings in which the Prosecution asked for an order allowing for the preservation and/or substitution of the information at issue.

- On or about 29 July 2015, Defense counsel for Mr. Ali received the adequate substitute of the information at issue, and on or about 5 November 2015, Defense counsel for Messrs Mohammad, Bin 'Attash, Binalshibh and Hawsawi received the adequate substitute of the information at issue, after they finally signed the Memorandum of Understanding associated with *Third Amended* Protective Order #1 so they could receive classified information.

- In one of his rulings on the issue, the Military Judge found that that by producing the summary of this information, the Government was considered to have met its discovery obligations regarding the information that was preserved and/or substituted. Other information has been preserved, but not disclosed to the Defense, pending additional litigation in the case.

- Due to miscommunication between the Trial Judiciary and the Prosecution team as to who was to deliver a classified, redacted order to the Defense, the Defense did not receive the Order authorizing the preservation and/or substitution of the classified information until January 2016.

These are the facts, and there is no evidence proffered by the Defense to suggest that anything other than the above-stated facts is what occurred during the litigation. The Defense was put on notice two days after the ruling was issued that a ruling had occurred on the Prosecution's motion seeking the relief the Defense had sought to prevent in a subsequent filing. The Defense also received the actual substitute of the information at issue on 2015 after they finally got around to signing the MOU that allowed for them to access classified information. While the Defense is blameless for not knowing the specifics of what that ruling entailed, the very fact that the ruling was sent to all the parties at all undermines the Defense argument that there was some collusion between the Military Judge and the Prosecution team, or that the

Military Judge committed a "judicial head-fake" on the Defense. The only evidence, as based on the rulings, filings, and orders in this case is that there was a miscommunication (or lack of communication) between the Trial Judiciary and the Prosecution on the provision of the redacted order to the Defense. Based on these facts, a disinterested lay observer would not harbor a significant doubt as to the Military Judge's impartiality in this issue.

As neither the Military Judge nor the Prosecution acted in any way that would warrant recusal, the Defense motion to recuse and abate the proceedings should be denied.

6. Conclusion.

Recusal of the Military Judge and the Prosecution team is not necessary, nor is abatement of the proceedings. Any disinterested observer, knowing the facts as they actually occurred, would harbor no doubt as to the fairness and impartiality of the Military Judge.

7. Oral Argument

The Prosecution is willing to waive oral argument but requests an opportunity to be heard should the defense be granted oral argument.

8. Witnesses and Evidence

None.

9. Attachments.

A. Certificate of Service dated 24 May 2016.

Respectfully submitted,

/s/

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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 24th day of May 2016, I filed AE 425C (GOV) the **Government Response** To Mr. Mohammad's Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
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